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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re: ADVANCED FLEET MAINTENANCE, INC., Debtor.	**Chapter 7** **Case No. 13-44173 (CEC)**
ROBERT L. GELTZER, as Chapter 7 Trustee of ADVANCED FLEET MAINTENANCE, INC., Plaintiff, v. ADVANCE FLEET MAINTENANCE LLC, AFM MAINTENANCE LTD. and FRANK ALMONA, Defendants.	**Adv. Pro. No. 15-01083 (CEC)**

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR WRIT OF EXECUTION AND TURNOVER ORDER

TABLE OF CONTENTS

Preliminary Statement 1

Statement of Facts 2

Argument 2

PLAINTIFF SHOULD BE GRANTED A WRIT OF EXECUTION AND AN ORDER DIRECTING THE TURNOVER OF FUNDS BELONGING TO JUDGMENT DEBTOR ALMONA HELD BY AGL 2

A. This Court has Jurisdiction to Hear this Matter 2

B. Plaintiff is Entitled to the Relief Requested 3

1. Turnover Order Pursuant to CPLR § 5225(b) 3

2. Writ of Execution Pursuant to CPLR § 5230 5

Conclusion 5

TABLE OF AUTHORITIES

Page(s)

Cases

Beauvais v. Allegiance Sec., Inc.,
942 F.2d 838 (2d Cir. 1991) 3, 4

De Ping Song v. 47 Old Country, Inc.,
975 F.Supp.2d 288 (E.D.N.Y. 2013), *judgment vacated*, 578 Fed. Appx 22.
(2d Cir. 2014) 3

Epperson v. Entertainment Express, Inc.,
242 F.3d 100 (2d Cir. 2001) 2

Mitchell v. Lyons Professional Services, Inc.,
727 F.Supp.2d 120 (E.D.N.Y. 2010) 3

Northern Mariana Islands v. Canadian Imperial Bank of Commerce,
717 F.3d 266 (2d Cir. 2013) 3

Statutes and Rules

Federal Rule of Bankruptcy Procedure 7069 1

Federal Rules of Civil Procedure, Rule 69 .... 1, 2, 3

New York CPLR § 5205(c) 2, 4

New York CPLR § 5225 .... 1, 2, 3

New York CPLR § 5230 .... 2, 5

New York Insurance Law § 3212(d)(2) 1, 2, 4, 5

Preliminary Statement

Plaintiff, Robert L. Geltzer, as chapter 7 trustee (the "**Trustee**" or "**Plaintiff**"), of the Debtor Advanced Fleet Maintenance, Inc. (the "**Debtor**") in the above-captioned bankruptcy case, and as Trustee, the Plaintiff in the above-captioned adversary proceeding (the "**Adversary Proceeding**"), respectfully submits this Memorandum of Law in support of his motion for the issuance of a writ of execution and for a turnover order, pursuant to Federal Rule of Civil Procedure 69(a), which is made applicable to this Adversary Proceeding under Federal Rule of Bankruptcy Procedure 7069, and pursuant to Sections 5225(b) and 5230 of the New York Civil Practice Law and Rules (**"CPLR"**) and Section 3212(d)(2) of the New York Insurance Law.

In December 2015, Plaintiff obtained a judgment (the **"Judgment"**) in the Adversary Proceeding against Defendants Advance Fleet Maintenance, LLC (**"Advance Fleet"**), AFM Maintenance Ltd. (**"AFM"**) and Frank Almona (**"Almona"**) (collectively, **"Defendants"** or **"Judgment Debtors"**) in the amount of $230,000.00. (Dkt. 12; **Exhibit "A"** to the accompanying affirmation of Robert A. Wolf, Esq. (the "Wolf Affirmation" or "Wolf Aff.")). Judgment Debtors have failed to pay voluntarily any amount towards the Judgment. Due to Plaintiff's judgment enforcement efforts over the past year (and the expense associated therewith), Plaintiff obtained funds from Defendant AFM's bank account totaling approximately $24,000. However, the lion's share of the Judgment has not been satisfied, and there remains due and owing to Plaintiff the sum of $205,975.69, plus interest.

Plaintiff has discovered through its Judgment enforcement efforts that Judgment Debtor Almona has an annuity contract (the **"Annuity"** or **"Annuity Account"**) with American General Life Insurance Company (**"AGL"**) (an AIG entity, and successor-in-interest to the United States Life Insurance Company). The amount currently in the Annuity Account is approximately

$181,784, and the account is being restrained by AGL, pursuant to an Information Subpoena with Restraining Notice served by Plaintiff. Pursuant to CPLR § 5205(c), as the Annuity was established with monies deposited by Almona (and not by a third party), the funds are not exempt from enforcement of the Judgment. Under New York Insurance Law § 3212(d)(2), the Court has discretion to order funds from the Annuity to be delivered to Plaintiff in partial satisfaction of the Judgment. As discussed herein, the Court should exercise its discretion and direct that funds from the Annuity be turned over to Plaintiff.

STATEMENT OF FACTS

The Court is respectfully referred to the Wolf Affirmation for a full recitation of the relevant facts and the exhibits annexed thereto.

ARGUMENT

PLAINTIFF SHOULD BE GRANTED A WRIT OF EXECUTION AND AN ORDER DIRECTING THE TURNOVER OF FUNDS BELONGING TO JUDGMENT DEBTOR ALMONA HELD BY AGL

A. This Court has Jurisdiction to Hear this Matter

Rule 69 of the Federal Rules of Civil Procedure provides that judgments are enforced by writs of execution. Rule 69(a) provides, in part, that: "The procedure on execution – and in proceedings supplementary to and in aid of judgment or execution – must accord with the procedure of the state where the court is located . . . " Thus, federal courts may consider post-judgment motions, such as this, pursuant to CPLR Sections 5225 and 5230, under their ancillary jurisdiction. *See, e.g., Epperson v. Entertainment Express, Inc.*, 242 F.3d 100, 106 (2d Cir. 2001) (permitting post-judgment proceeding to enforce judgment under the court's ancillary enforcement jurisdiction).

While CPLR § 5225 requires a "special proceeding" to be commenced for a turnover order, it is well-established that because a "special proceeding" is a creature of New York practice that has more in common with motion practice than it does with a plenary action, a motion made under Fed. R. Civ. P. 69 is a permissive vehicle for a federal proceeding applying CPLR § 5225. *See, e.g., Mitchell v. Lyons Professional Services, Inc.*, 727 F.Supp.2d 120, 123-24 (E.D.N.Y. 2010); *De Ping Song v. 47 Old Country, Inc.*, 975 F.Supp.2d 288 (E.D.N.Y. 2013), *judgment vacated*, 578 Fed. Appx 22. (2d Cir. 2014).

B. Plaintiff is Entitled to the Relief Requested

1. Turnover Order Pursuant to CPLR § 5225(b)

A turnover order under CPLR § 5225(b) allows a judgment creditor to execute upon property that belongs to a judgment debtor but is in the possession of a third party. *See Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 717 F.3d 266, 267 (2d Cir. 2013). CPLR § 5225(b) provides that:

> Property not in the possession of the judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court ***shall require*** such person to pay the money, or so much of its as is sufficient to satisfy the judgment to the judgment creditor. [Emphasis added].

By its express language, § 5225(b) provides for a "two-step analysis" to determine whether the third party must turn over the property to the judgment creditor. *See Beauvais v. Allegiance Sec., Inc.*, 942 F.2d 838, 840 (2d Cir. 1991). The Court must first find that the debtor "has an interest" in the property, and if such finding is made, then the Court must find either that the debtor is entitled to possess the property or that the creditor's rights to the property are superior to those of the third party. *Id.* If the Court makes an appropriate finding under both steps, then it may order the third party to turn over the property to the judgment creditor. *Id.* at 840-41.

Here, the first step is clearly satisfied, as there is no question but that Judgment Debtor Almona has an interest in the property at issue – AGL is holding an Annuity that indisputably belongs to Almona. (*See* Wolf Aff., Ex. C). Moreover, because the Annuity was created with Almona's personal deposit of funds (Wolf Aff., ¶ 8; Ex. C), the trust exemption under CPLR § 5205(c) is not applicable. The trust exemption applies only to property held in trust for a judgment debtor "where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor." CPLR § 5205(c). Because the Annuity was created with Almona's funds, the Annuity is not exempt from judgment enforcement.

As for the second step, Plaintiff is entitled to the turnover of a portion of the proceeds in the Annuity Account pursuant to New York Insurance Law § 3212(d)(2), which provides that a court may order an annuitant "to pay to a judgment creditor or apply on the judgment in installments, a portion of [t]he benefits [under an annuity contract] that appears just and proper to the court, with due regard for the reasonable requirements of the judgment debtor and his family, if dependent upon him, as well as any payments required to be made by the annuitant to other creditors under prior court orders." It would be just and proper for the Court to order that a portion of the funds in the Annuity should be turned over to Plaintiff in partial satisfaction of the Judgment. Defendants have not made a single voluntary payment of the outstanding amount, or attempted to work out a reasonable payment plan, since the docketing of the Judgment one year ago. Almona's improper and egregious acts concerning the transfer of the assets of the Debtor resulted in Plaintiff obtaining the Judgment, and Almona should be held accountable for the payment of same. At least a portion of the funds in the Annuity should be distributed to Plaintiff in partial payment of the large outstanding Judgment.

2. Writ of Execution Pursuant to CPLR §5230

In the alternative or in addition to the turnover order, the Court should issue a writ of execution pursuant to CPLR §5230, which allows courts to authorize "an execution" on property to satisfy a judgment. CPLR § 5230(b) provides that:

> At any time before a judgment is satisfied or vacated, an execution may be issued from the [court] in the county in which the judgment was first docketed, by the clerk of the court or the attorney for the judgment creditor as officer of the court, to the sheriffs of one or more counties of the state, directing each of them to satisfy the judgment or order out of the real and personal property of the judgment debtor or obligor and the debts due to him or her.

As with CPLR § 5225(b), §5230 requires a creditor to show that the debtor "has an interest" in the property, which, as discussed above, clearly has been satisfied here.

In sum, Plaintiff has spent considerable time and expense in attempting to collect on the Judgment that it obtained in December 2015, and Judgment Debtors have not made any voluntary payments. Defendant Almona's Annuity is not exempt from execution, and pursuant to New York Insurance Law § 3212(d)(2), this Court should find that Plaintiff is entitled to a portion of the funds in the Annuity to partially satisfy the Judgment, and should grant the relief requested by Plaintiff.

CONCLUSION

For the reasons set forth herein, Plaintiff's motion should be granted in its entirety, and the Court should grant such other and further relief in favor of Plaintiff as it may deem just and proper.

Dated: New York, New York
December 20, 2016

Respectfully submitted,

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